BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in this cause is not yet officially reported, but is set out on pages 228-237 of the record filed herein.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was rendered herein on January 10, 1941 (Rec. p. 237), and the petition for rehearing was denied on February 3, 1941 (Rec. 247). Thirty days stay of mandate was granted on February 13, 1941 (Rec. p. 247).

The following cases are believed to sustain the jurisdiction of this Court:

West v. American Telephone & Telegraph Co., ... U. S. ..., 85 Law. Ed. 146;

Six Companies of California v. Joint Highway District No. 13, ... U. S. ..., 85 Law. Ed. 159;

Fidelity Union Trust Co. v. Field, ... U. S. ..., 85 Law. Ed. 176;

Stoner v. New York Life, ... U. S. ..., 85 Law. Ed. 275.

III.

STATEMENT OF CASE.

Under the heading "A" in the petition *ante* is a statement of the case so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERROR.

The Circuit Court of Appeals for the Eighth Circuit erred in holding (Rec. pp. 234-236) that under the law of the State of Illinois the insanity of the insured excused a failure to comply with the requirement of the policies for the furnishing to the petitioner of due proof of the total and permanent disability of the insured while the policy was in force or within six months after the due date of any premium in default.

This holding of the Court of Appeals for the Eighth Circuit is contrary to the holding of the Illinois Appellate Court for the Fourth District in the case of Continental National Bank & Trust Co., Conservator of Joseph L. Spilky, Incompetent, v. New York Life Insurance Co., in an opinion rendered in said cause on May 29, 1930 (Rec. pp. 177-184), and is also contrary to the holding of the intermediate Appellate Courts of Illinois in Scheiber v. Protected Home Circle, 146 Ill. App. 574; Noel v. Modern Woodmen, 61 Ill. App. 597, and Grand Lodge A. O. U. W. v. Jesse, 50 Ill. App. 101.

V.

ARGUMENT.

The Court of Appeals held in this case that under the law of Illinois the insanity of the insured from and after September, 1930, excused a failure to comply with the condition of the policies for the furnishing to petitioner of due proof of insured's disability before insured would be entitled to a waiver of the payment of premiums due under the policies during the continuance of such disability and likewise excused compliance with the further condition of the policies that they would only be reinstated because of the insured's disability at the time of their lapse for the nonpayment of premiums, if due proof of insured's disability was furnished to petitioner within six months after the date of such lapse.

That holding is squarely in conflict with the holding of the Illinois Appellate Court for the First District in an opinion rendered by that Court on the 29th day of May, 1930, in Continental National Bank & Trust Co., Conservator of Joseph L. Spilky, Incompetent, v. New York Life Insurance Company. The opinion rendered in that case is not officially reported in the Illinois reports, but those reports show that an opinion was rendered in that case on May 29, 1929 (257 Ill. App. 651). However, the petitioner at the trial introduced in evidence a certified copy of the opinion rendered by the Illinois Appellate Court in that case, and the same will be found on pages 177-184 of the record.

The policy in that case, as appears from the opinion (Rec. pp. 178-179), contained a disability benefit under which the company agreed upon receipt of due proof of the total and permanent disability of the insured to waive the payment of all premiums under said policy and to pay a specified amount monthly to the insured during the con-

tinuance of such disability. After the issue of the policy the insured became insane, but no proof of his disability was furnished to the company until some time later, when the Bank was appointed his conservator. Insured had paid several premiums on the policy after he became insane, and after the Bank had been appointed his conservator it brought suit for the recovery of those premiums as well as the monthly income provided for under the disability benefit of the policy on the ground that the insanity of the insured excused a compliance with the requirement of the policy for the furnishing to the company of due proof of the insured's disability. The Illinois Appellate Court held that the insanity of the insured did not excuse the failure to comply with this condition of the policy, and denied a recovery for the return of the premiums paid on the policy during the insured's insanity as well as for a recovery of the monthly income benefits provided for by the policy during that period. The Illinois Appellate Court in that connection said (Rec. p. 182):

> "Upon the trial plaintiff contended, in view of the stipulated facts, as above, that the company should make reimbursement of such premiums and should also pay the disability benefits for said prior years for the reason that the insured, *being insane*, was 'excused' of furnishing proofs of such disability as required by the policy. It is apparent from the trial court's rulings on the propositions of law, as above mentioned, and from its finding and judgment, that it agreed with plaintiff's contention. We are of the opinion that, under the provisions of the policy and the undisputed facts, these contentions (also urged here) are not in accord with the general current of the decisions in this and other states."

The Court of Appeals in the case at bar (R. p. 235) undertook to distinguish the holding of the Illinois Appellate Court in the above case on the ground that that case did not (as here) involve a lapse of the policy for the nonpay-

ment of premiums, but only involved the right to recover disability benefits during the period of insured's insanity prior to the furnishing of due proof of such disability to the company. If, however, the insanity of the insured did not excuse a failure to furnish proof of his disability in a suit to recover the disability benefits provided for by the policy, then it would certainly not excuse a failure to furnish such proof within six months after the lapse of the policies as a condition to the right of the insured to have the premium in default waived because of his disability at the date of such lapse. Furthermore, the additional holding of the Court of Appeals in the case at bar that the respondent was entitled to recover all of the premiums paid on the policies in suit subsequent to September, 1930, on the ground that the insanity of the insured excused a compliance with the requirement of the policies for the furnishing of proof of insured's disability is squarely in conflict with the holding of the Illinois Appellate Court in the above case that there could be no recovery of the premiums paid under such circumstances.

In Scheiber v. The Protected Home Circle, 146 Ill. App. 574, a certificate of insurance issued by a fraternal order lapsed for the nonpayment of dues while the insured was insane. The certificate provided that it might be reinstated upon the application of the insured member and the payment of the dues in arrears. The Court of Appeals held that the insanity of the insured member did not excuse either the payment of dues or a compliance with the conditions of the certificate which were necessary to secure a reinstatement of the policy. The Court said (l. c. 579):

> "The court held as a proposition of law that the insanity of Scheiber 'did not relieve him from a compliance with the rules and regulations of the defendant society, relating to the reinstatement of suspended members.' That such is the law is not disputed. Sec.

295, Niblock on Benefit Societies (2nd Ed.); Noel v. Modern Woodmen, 61 Ill. App. 597; A. O. U. W. v. Jesse, 50 ibid. 101. Neither will insanity excuse the non-payment of dues and assessments so as to operate to keep an insurance certificate in force while the insured is insane. *Insanity* does *not* relieve *the insured from any obligation imposed by the terms of his insurance certificate,* with the *sole* exception of *personal attendance* in complying with the requisite conditions, that may be done by another for him."

In Noel v. Modern Woodmen, 61 Ill. App. 597, it was likewise held that the insured's insanity after the issue of a fraternal certificate did not excuse the insured's failure to comply with the conditions of the certificate. The Court in that connection said (l. c. 602):

"There is no claim that he lacked power or mental capacity to enter into the contract, or that it was invalid for any reason, and his subsequent mental incapacity could not relieve him from a compliance with its duties and regulations any more than any other form of contract."

In Grand Lodge A. O. U. W. v. Jesse, 50 Ill. App. 101, it was held that insured's insanity did not excuse a failure to comply with a condition of the policy that it would only be reinstated upon the furnishing of a certificate of good health. The Court said, l. c. 109:

"After the lapse of thirty days there was but one way for him to become reinstated, and that was by furnishing the required certificate of good health. That was an essential prerequisite to the revival of the contract between himself and the grand lodge, and in view of the nature of the objects for which associations of this kind are conducted, it was a reasonable one, and one upon which the ability of such organizations must depend in safety to their members.

"In this case, the arrearages that were received from Mrs. Jesse by the officers of the subordinate lodge and transmitted to the grand lodge, were promptly re-

fused and returned by the latter because the certificate of good health did not accompany them.

"It was the misfortune of Jesse that he was *unable* forever thereafter to furnish such certificate *because of his insanity,* but 'the rule seems fairly sustained *that insanity is no excuse.*' Hawkshaw v. Supreme Lodge, etc., 29 Fed. 770, and cases cited."

The Supreme Court of Illinois has never had occasion to determine the question whether the insanity of the insured excused a compliance with the requirement of a policy for the furnishing of due proof of the insured's disability to the company. It is well settled under the recent decisions of this Court that the federal courts, absent a controlling decision by the highest court of the state, must give effect to the law of the state as declared by its intermediate appellate courts (West v. American Telephone & Telegraph Co., ... U. S. ..., 85 Law. Ed. 146; Six Companies of California v. Joint Highway District No. 13, ... U. S. ..., 85 Law. Ed. 159; Fidelity Union Trust Co. v. Field, ... U. S. ..., 85 Law. Ed. 176; Stoner v. New York Life, ... U. S. ..., 85 Law. Ed. 275).

It is clear, however, that the Court of Appeals in the case at bar did not give effect to the law of Illinois as declared by the intermediate appellate courts of that state in the above cases and particularly in Continental National Bank & Trust Company case, supra, and for this reason we respectfully submit that a writ of certiorari should issue herein.

Respectfully submitted,

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